Supreme Court, U.S.
FILED
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(1)

No.

In The
Supreme Court of The United States
October Term 1997

BRUCE RING,

Petitioner,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, et al,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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90 pp

QUESTIONS PRESENTED

I.

Does the failure to submit a loan application on a specific form prevent a borrower from proving a rebuttable presumption of racial discrimination by a lender in violation of the Fair Housing Act, 42 U.S.C. §3601 *et seq.*?

II.

Does the futility doctrine permit a borrower to pursue a claim for racial discrimination under the Fair Housing Act, 42 U.S.C. §3601 *et seq.*, based upon his or her submission of loan documents which, pre-formal application, are rejected by a lender for racially discriminatory reasons?

PARTIES TO THE PROCEEDINGS BELOW

Bruce Ring, an individual.

Federal National Mortgage Association, a federally chartered stockholder-owned corporation organized and existing under the Federal National Mortgage Association Charter Act, 12 U.S.C. §1716, et seq.

First Interstate Commercial Mortgage Company, a Missouri corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Bruce Ring, was a real estate developer of multi-family residential projects in predominantly African-American census tracts of St. Louis, Missouri. Respondent First Interstate Mortgage, Inc. ("First Interstate") was engaged in the business of facilitating financing for real estate development in Missouri. Respondent Federal National Mortgage Association ("Fannie Mae") was and remains a federally chartered corporation which purchases loans secured by real estate loan originators such as First Interstate.

Mr. Ring seeks certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit which held that a borrower can not pursue a claim for racial discrimination under the Fair Housing Act as a matter of law if his or her loan application is not typed or printed on the form available from the lender.

OPINIONS BELOW

The opinion and judgment of the Eighth Circuit, entered on September 5, 1997, is unofficially reported at 1997 W.L. 545308 (8th Cir. 1997) and is reprinted at Apdx A - 1-4. Mr. Ring's Petition for Rehearing was denied without comment on October 6, 1997. Apdx A - 5. The order and judgment of the United States District Court for the Eastern District of Missouri, together with its order on post-judgment

motions are reprinted in the Appendix, at pages Apdx B - 6, 20, 62.

STATEMENT OF JURISDICTION

The opinion and judgment of the Eighth Circuit were entered on September 5, 1997. Apdx A - 1. On October 6, 1997, the Eighth Circuit denied Mr. Ring's timely Petition for Rehearing. Apdx A - 5. This petition for certiorari is being filed within 90 days of that denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1264(1).

STATUTES INVOLVED

Section 3605 of the Fair Housing Act, 42 U.S.C. §3601 *et seq.*, titled "Discrimination in residential real estate - related transactions" provides:

(a) **In general**

> It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, on the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) **Definition**

As used in this section, the term "residential real estate-related transaction" means any of the following:

(1) The making or purchasing of loans or providing other financial assistance--

(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or

(B) secured by residential real estate. . . .

STATEMENT OF THE CASE

As of August 1989, Mr. Ring owned six multi-family apartment buildings in North St. Louis City and one multi-family apartment dwelling in adjacent University City, Missouri. Six of the seven buildings had been rehabilitated from abandoned and boarded up structures for leasing to low- and moderate-income families. All were located in predominantly African-American neighborhoods.

Ring contacted Kenneth Green, Assistant Vice President of First Interstate, who, at the time, was authorized to originate and sell mortgages to Fannie Mae under the Designated Underwriting and Servicing Program (which was reserved for loans exceeding $1.0 million) and the Prior Approval Program (which did not require a minimum loan amount), to obtain refinancing of the existing loans on the properties that were maturing. Mr. Green went to each of the properties and found them to be in good physical condition.

Dep. 12/28/95, pp.101, 123, 200. He reviewed the financial information and told Ring that his properties qualified for Fannie Mae lending programs and that Ring could obtain a fifteen year loan at 7.5% interest per annum amortized over thirty-five years. Green and Ring put together an extensive loan package consisting of photographs, personal financial statements, operating information, and other pertinent documentation on the properties. Apdx C - 64.

On August 7, 1989 Green sent the loan package to Joseph Marsh, an underwriter in the Regional Office of Fannie Mae located in Dallas, Texas. A representative of Fannie Mae, in St. Louis on other business, drove through some of the obviously African-American neighborhoods where the properties were located but never got out of his car. Marsh then told Green that Fannie Mae was not interested in making a loan or loans in any amount on any of the seven properties and that the loan package was being returned:

> A. Sometime prior to August 30, after August 7, I received a call from Marsh saying it was something we could not do, it didn't meet our program, something to that effect.
>
> Q. All right. Did he go into any more detail?
>
> A. I asked him what the reasons were, he said just not something we're interest[ed] in, vague and could not nail him down on it.

Dep. 12/18/95, p.127, ll.9-16. The lack of an application typed or printed on the loan application form proscribed by Fannie Mae was not the reason for his written decision:

> A. I did not interpret the letter as, 'We are returning this because a loan application was missing in what you sent in to us.' It was, 'We will be unable to accept your request for a loan application for the referenced properties.'

Dep. 12/18/95, p.134, ll.14-18. First Interstate understood this to mean that Ring's loan package had been considered as an application and as such that it had been rejected:

> Q. Okay. When you got the letter from Marsh, what was your reaction when you read it?
>
> A. That it was rejected.
>
> Q. That what was rejected, sir?
>
> A. The request to proceed with any or all of these as a possible loan application.

Dep. 12/18/95, p.133, ll.12-17. On August 30 Marsh returned the loan package as promised stating that "[w]e are unable to accept your request for a loan application for the referenced properties." Apdx C - 67. After return of the loan package, Green told Ring that the unstated reason why the loan application was not processed was because the seven properties were in African-American neighborhoods.

Three months later, in a letter signed by William A. Maloni, Senior Vice President-Policy and Public Affairs, in the National Office located in Washington, D.C., Fannie Mae, for the first time, took the position that the loan package had been returned, not because of the lack of a formal application, but because "[f]ive properties were not in satisfactory physical condition." Apdx C - 69. Mr. Maloni thereafter reiterated that Fannie Mae would not finance five of the properties no matter what application was submitted.

> The Regional Office determined that it could not finance *five* of the *seven* properties because their physical condition was not satisfactory and several appeared uninhabitable.

(emphasis supplied) Apdx C - 72.[1]

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[1]The given reason was a pretext for discrimination. In fact: (1) Gene Glaser, Sr. Investment Officer with the Regional Office, the only officer of Fannie Mae to ever see the properties as of that date, quickly drove by three buildings, and did not conclude that Ring's loan package should be returned because the properties were in unsatisfactory physical condition. Dep. 5/10/95, p.54, ll.11-13; (2) Marsh, the individual that returned the loan package to Green, did not advise the National Office that the Regional Office had determined that the properties were in unsatisfactory physical condition. Dep. 5/18/95, p.84, ll.13-23; and (3) Maloni, who claimed he did not write the December 4 letter and did not know who did, had absolutely no explanation as to where this statement came from. Dep. 11/2/95, p.20, ll.11-16.

Ring was unable to obtain refinancing from any other lender or sell the properties. All properties were ultimately lost through foreclosure or involuntary bankruptcy proceedings.

Ring initially sued First Interstate and Fannie Mae in Missouri state court for illegally refusing to provide long-term mortgage financing for his multi-family residential properties in minority areas. The case was removed to the United States District Court for the Eastern District of Missouri pursuant to 28 U.S.C. §§1331 and 1332 and 42 U.S.C. §3613. The district court dismissed the action concluding that Ring had "not alleged the elements necessary to prove a *prima facie* case" of discrimination under Section 3605 of the Fair Housing Act. Ring appealed. The Eighth Circuit reversed and remanded holding that Ring did not need to plead each element of a *prima facie* case of discrimination to state a cause of action upon which relief could be granted. *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924 (8th Cir. 1993) ("*Ring I*").

On remand Fannie Mae moved for summary judgment asserting, among other things, that Ring was unable to prove the application element of his *prima facie* case of discrimination based upon disparate treatment because the proscribed form - Multifamily Loan Application ("FNMA

Form 1053")[2] together with the $177,500.00 application and appraisal fee had never been submitted.[3] Ring opposed the motion and filed the deposition testimony of Marvin Rausch, a mortgage banking expert:

> Q. Do you have any knowledge or understanding as to whether there was actually a loan application present?
>
> A. What do you mean by a loan application?
>
> Q. Well, you've talked about how Kislak, that one of the things that you would do after gathering all the information you told me you gathered is that you would then complete a loan application which was a two-page form or a four-page form, I think you said.
>
> Do you know --
>
> A. Different companies use different processes. Some have their own

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[2]FNMA Form 1053 was filed as a lodging with the Clerk of the Supreme Court contemporaneously with the petition for certiorari.

[3]First Interstate did not join in this assertion. It conceded in the district court and on appeal that the preliminary loan package was an application and as such that it had been rejected by Fannie Mae. Brief at 4.

> internal application form and they either convert to the ultimate lenders form; Fannie, Freddie, S & L bank, insurance company, what have you, or just use the form of the ultimate lender; Fannie or Freddie, let's say.
>
> So, I don't know what form of application might have been made. The word application in my vocabulary germane only to the mortgage banking industry is such that if you're a lender and I asked you if you would make a loan, I made an application to you. If you say to me hey, it's not an application unless it's a formal written completed form that our institution uses, then you have to say that to me.
>
> But an application, if I call a lender as a borrower, and I say would you consider making a loan, I'm applying to you, that's a - that's a loan application.

Dep. 11/16/95, p.139, l.1-p.140, 1.3 and Calvin Bradford, an expert on Fannie Mae's lending policies, practices and procedures:

Q. Going to your outline, your Point No. 1 says that you have an opinion on whether there was an application. Is that right?

A. That's correct.

Q. What opinion do you have on the subject of whether or not there was an application?

A. Yes. My opinion was that there was an application in this case.

Dep. 12/20/95, p.72, ll.17-24 who opined that the August 7 loan package was an application and that FNMA Form 1053 was not required to establish a *prima facie* case under the circumstances. The district court did not decide whether Ring's "[p]reliminary loan package qualified as an 'application' for purposes of his prima facie case, or whether a formal application would have been futile . . ." but granted the summary judgment motion on other grounds. Apdx B - 20.[4] Ring again appealed.

Without addressing the bases of the conclusion reached by the district court, the Eighth Circuit affirmed the summary judgment "[b]ecause Ring failed to submit an

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[4]The district court granted summary judgment on two erroneous bases: (1) that the housing discrimination claim was time-barred by the statute of limitations found in 42 U.S.C. §3613(a)(1); and (2) that Ring was not qualified for a loan as a matter of law. Apdx B - 20.

application for a loan" as a matter of law. Apdx A - 1. On October 6, 1997 Ring's Petition for Reconsideration was denied. Apdx A - 5. This petition for certiorari seeks review of the court of appeals' decision which held that a borrower cannot pursue a claim for racial discrimination under the Fair Housing Act as a matter of law if his or her loan application is not typed or printed on the form proscribed by the lender.

REASONS FOR GRANTING THE WRIT

An employee must first prove a *prima facie* case of discrimination to create a rebuttable presumption of disparate treatment that shifts the burden to the employer to articulate some legitimate, non-discriminatory reason for the conduct. If the employer does so, the presumption created by the *prima facie* case drops out of the picture and the burden shifts back to the employee to show that the given reason was just a pretext for discrimination. *See McDonnell Douglas Corp. v. Greene,* 411 U.S. 792, 93 S.Ct. 9817, 36 L.Ed. 2nd 668 (1973), *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2nd 207 (1981).

The Department of Housing and Urban Development has adopted the three-stage *McDonnell Douglas/Burdine* test for evaluating claims of discrimination under the Fair Housing Act. *See HUD v. Blackwell,* 908 F.2d 864 (11th Cir. 1990); *accord United States v. Badgett,* 976 F.2d 1176 (8th Cir. 1992). In the context of a claim under 42 U.S.C. §3605, the first stage of the test (the *prima facie* case) requires a borrower to prove that he or she "[a]pplied . . . for a loan"

from the lender before a rebuttable presumption of disparate treatment is created. *Ring I* at 926. The decision below equating the application prong of the *prima facie* case to require the utilization of a form created by Fannie Mae and the refusal to consider the futility doctrine conflicts with decisions of this Court and of the court of appeals and presents an important question as to the application of the *McDonnell Douglas/Burdine* test to claims brought under the Fair Housing Act.

I. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE THIRD CIRCUIT IN *E.E.O.C. v. METAL SERVICE CO.*, 892 F.2d 341 (3rd Cir. 1990) AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW AS TO WHAT CONSTITUTES AN "APPLICATION" UNDER THE FAIR HOUSING ACT, 42 U.S.C. §3605 *ET SEQ.*

Courts have generally held that the failure to formally apply for a job opening will not bar a Title VII plaintiff from establishing a *prima facie* claim of discriminatory hiring as long as the employee makes every reasonable attempt to convey his or her interest in the job to the employer. *E.E.O.C. v. Metal Service Co.*, 892 F.2d 341, 348-49 (3d Cir. 1990) (citations omitted).[5] Title VII cases are equally

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[5]The Eighth Circuit has itself recognized this principle. *See Chambers v. Wynne School District*, 909 F.2d 1214 (8th Cir.

applicable to analyses under the Fair Housing Act. *See Blackwell*; *Badgett* and *Ring I* at 926, n.2.

As the prospective employees of Metal Service Co. conveyed their interest in the jobs to the employer without a formal application being completed, Ring conveyed his interest in a loan to Fannie Mae without the submission of FNMA Form 1053. Aside from First Interstate who understood the August 7 loan package to be an application and Fannie Mae's response to the package to be a rejection, two experts also provided unrebutted opinions that Ring had applied and that he had been rejected.

The *prima facie* requirement was never intended to be rigid, mechanized or ritualistic. *United States Serv. Bd. v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed. 2nd 403, 407 (1983); *Ring I* at 927. Instead, courts must be sensitive to the myriad of ways such an inference can be created. Simply stated, an employee has established a *prima facie* case when sufficient evidence is offered such that the court can infer that if the employer's actions remain unexplained, it is more likely than not that such actions were based on impermissible reasons. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576, 98 S.Ct. 2943, 2949, 57 L.Ed. 2nd 957, 963 (1978) (considering a claim under Title VII).

1990) (formal application for a job opening is not required to establish *prima facie* case of employment discrimination under Title VII).

The formal application demanded by the Eighth Circuit is not commanded by the Fair Housing Act or case law. Imposing that strict ritualistic requirement as a condition precedent undermines the viability of the principle set forth in *Metal Service Co.* and substitutes an inflexible legal standard for what is characteristically a question of fact. Indeed it puts the application cart before the horse of discrimination, allowing a lender who has communicated his discriminatory practice to avoid the consequences of that conduct by claiming that a formal application is more important than remedying a discriminatory act.

II. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN *INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. UNITED STATES*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed. 2nd 396 (1977) AND THE DECISION OF THE FOURTH CIRCUIT IN *PINCHBACK v. ARMISTEAD HOMES CORP.*, 907 F.2D 1447 (4th Cir. 1990), *cert. denied*, 498 U.S. 983, 111 S.Ct. 515, 112 L.Ed. 2nd 527 (1990), AND PRESENTS THE IMPORTANT QUESTION OF FEDERAL LAW AS TO THE APPLICABILITY OF THE "FUTILITY DOCTRINE" UNDER THE FAIR HOUSING ACT, 42 U.S.C. §3605 *ET SEQ.*

The starting point for this conflict is found in *International Brotherhood of Teamsters v. United States*, 431

U.S. 324, 97 S.Ct. 1843, 52 L.Ed. 2nd 396 (1970) wherein this Court stated:

> [T]he company's assertion that a person who has not actually applied for a job can *never* be awarded seniority relief cannot prevail . . . A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection . . . when a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture, he is as much a victim of discrimination is as he who goes through the motions of submitting an application.

(original emphasis).[6]

This fair employment concept was imported into fair housing law in *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447 (4th Cir. 1990), *cert. denied*, 498 U.S. 983, 111 S.Ct. 515, 112 L.Ed. 527 (1990). In that case, Karen

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[6]The Eighth Circuit has also recognized this doctrine. *See Winbush v. State of Iowa*, 66 F.3d 1471 (8th Cir. 1995) (employment discrimination plaintiff need not prove that they formally applied for position if they allege facts, which if proven, would be sufficient to establish that application was futile due to the defendant's discriminatory practices).

Pinchback filed suit against Armistead Homes Corp. for refusing to lease an apartment in Armistead Gardens to her in violation of the Fair Housing Act. The defendant argued that Pinchback's failure to fill out a lease application precluded her from pursuing the claim and that the "futile gesture" or "futile act" doctrine developed in Title VII employment claims was inapplicable to claims under the Fair Housing Act. Citing *International Brotherhood of Teamsters,* the Fourth Circuit rejected both arguments and held that Pinchback could prove a *prima facie* case of housing discrimination, even without informally applying because there was some evidence that it would have been futile to submit a formal application.

The futility doctrine is directly applicable here. What purpose would have been served by Ring submitting FNMA Form 1053 (which actually contained less information than his August 7 loan package) and paying $177,500.00 after Fannie Mae had clearly communicated that OWNERS OF MULTI-FAMILY PROPERTIES IN AFRICAN-AMERICAN NEIGHBORHOODS NEED NOT APPLY. The refusal of the Eighth Circuit to consider the "futility doctrine" completely eviscerates the promise of the Fair Housing Act and reflects a disposition to summarily dispose of discrimination claims in a rigid, mechanistic and ritualistic manner contrary to the dictates of this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 5, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3578

Bruce Ring,	*	
Appellant,	*	
	*	Appeal from the United States
V.	*	District Court for the Eastern
	*	District of Missouri
National Mortgage	*	
Association, a Corporation;	*	[UNPUBLISHED]
First Interstate Commercial	*	
Mortgage Company, A	*	
corporation; Prentis Hall	*	
Corporation Systems,	*	
Appellees.	*	

Submitted: June 12, 1997
Filed: September 5, 1997

Before RICHARD S. ARNOLD, Chief Judge, BEEZER[1] and WOLLMAN, Circuit Judges.

Beezer, Circuit Judge.

Bruce Ring appeals the district court's grant. of

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[1]The Honorable Robert R. Beezer, United States Circuit Judge for the Ninth Circuit, sitting by designation.

summary judgment in favor of defendants Federal National Mortgage Association ("FNMA") and First Interstate Bank ("FIB"). Alleging discrimination in lending, Ring sued FNMA and FIB under the Fair Housing Act. Because the parties are familiar with the underlying facts, we do not describe them except as necessary. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

I

Ring challenges the district court's grant of summary judgment to defendants. We may affirm summary judgment on any basis supported by the record. United States v. Lohman, 74 F.3d 863, 866 (8th Cir.), cert. denied, 116 S. Ct. 2549 (1996). We affirm the district court's grant of summary judgment because Ring failed to submit an application for a loan.[2]

II

Ring also claims that the district court should have granted him leave to amend his complaint. Given Ring's numerous previous amendments, the facial inadequacy of his proposed amendment and the prejudice accrued to FNMA and

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[2]Because we affirm on this ground, we need not consider whether Ring's suit was time-barred or whether Ring failed to show that he was qualified for FNMA financing.

FIB, the district court was within its discretion to deny Ring leave to amend. See Pulla v. Amoco Oil Co., 72 F.3d 648, 658 (8th Cir. 1995).

III

Because we affirm the grant of summary judgment, we do not reverse the award of costs to FNMA.

AFFIRMED

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3578EMSL

Bruce Ring,	*
Appellant,	*
	* Appeal from the United States
V.	* District Court for the Eastern
	* District of Missouri
National Mortgage	*
Association, a Corporation;	*
First Interstate Commercial	*
Mortgage Company, A	*
corporation; Prentis Hall	*
Corporation Systems,	*
Appellees.	*

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

September 5, 1997

A true copy.

ATTEST: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3578EMSL

Bruce Ring,	*
Appellant,	*
	* Appeal from the United States
V.	* District Court for the Eastern
	* District of Missouri
Federal National Mortgage	*
Assoc., et al.,	*
Appellees.	*

The petition for rehearing filed by the appellant has been considered by the court and is denied.

October 6, 1997

Order Entered the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BRUCE RING,

Plaintiff,

V. Cause No. 4:93CV2562 JCH

FEDERAL NATIONAL MORTGAGE ASSOCIATION, and FIRST INTERSTATE COMMERCIAL MORTGAGE COMPANY,

Defendants.

MEMORANDUM AND ORDER

This matter comes before the Court on Plaintiff's Motion for Reconsideration and or Motion to Alter or Amend Judgment Under Rule 59 (e); Defendant First Interstate Commercial Mortgage Company's (First Interstate's) Motion to Strike; Defendant Federal National Mortgage Association's (Fannie Mae's) Motion to Strike Exhibits to Plaintiff's "Motion for Reconsideration;" Defendant First Interstate's Motion for Attorney's Fees; Defendant Fannie Mae's Motion for an Award of Attorneys' Fees and Expenses; and Defendant Fannie Mae's Motion for Costs and Bill of Costs.

On April 29, 1996, the Court denied Plaintiff's Motion for Leave to Amend his Complaint. The Court also granted summary judgment for 'both Defendants on the grounds that

Plaintiff 's claim was time-barred, and alternatively on the grounds that Plaintiff failed to establish a factual dispute as to whether he was qualified for a Fannie Mae-backed loan, an essential element of his prima facie case under the Fair Housing Act, 42 U.S.C. 9 3601 et sea.

The Federal Rules do not recognize a motion for reconsideration. Anthony v. Runyon, 76 F.3d 210, 215 (8th Cir. 1996). Although the Rules do authorize a motion to alter or amend, Fed. R. Civ. P. 59 (a) , (e) , such a motion "'I cannot be used to raise arguments which could, and should, have been made before the trial court entered final judgment.'" Garner v. Arvin Industries, Inc., 77 F.3d 255, 258 (8th Cir. 1996), quoting Bannister v. Armontrout, 4 F.3d 1434, 1440 (8th Cir. 1993), cert. denied, 115 S.Ct. 418 (1994), Accord Concordia College Corp. v. W.R. Grace , Co., 999 F.2d 326, 330 (8th Cir. 1993) (party may not use Rule 59(e) motion "'to introduce new evidence that could have been adduced during pendency of the summary judgment motion"' or to "'tender new legal theories for the first time"), cert. denied, 510 U.S. 1093 (1994), quoting Hagerman v. Yukon Energy Corp., 839 F.2d 407, 413 (8th Gir.), cert. denied, 488 U.S. 820 (1988).

The Rules also authorize a motion for relief from judgment for any of the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a

> new trial under Rule 5 9 (b) , (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60 (b).

Plaintiff does not purport to bring his motion pursuant to Rule 60(b). Moreover, he does not allege any grounds for relief that are cognizable under Rule 60(b), and the Court finds that no such grounds apply in the present case. Therefore the Court concludes that Plaintiff's motion arises solely under Rule 59.

Every argument raised in the Motion for Reconsideration and or Motion to Alter or Amend Judgment either was raised or could have been raised in the briefs on Defendants, dispositive Therefore the Court declines to mo ions. rule on such arguments. Garner, 77 F.3d at 258; Concordia College, 999 F.2d at 330.

Plaintiff asserted a new legal argument in support of his Motion for Reconsideration by way of a "Notice of Filing" on May 20, 1996. Attached to the "Notice" is an

unauthenticated copy of a May 16, 1996 letter from Elizabeth K. Jullan, Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, to Plaintiff's counsel. The letter apparently is in response to a letter from Plaintiff's counsel requesting HUD to file an affidavit with this Court concerning the statute of limitations question. In the letter, Ms. Jullan states,

> It is not generally HUD's practice to support individual plaintiffs or defendants in private litigation under the Act. Accordingly, I decline to provide the requested affidavit.

(Exhibit to Pltf's May 20, 1996 "Notice of Filing," at 2). Nonetheless, Ms. Jullan then proceeds to provide Plaintiff's counsel with a detailed analysis of HUD's opposition to the Court's determination that Plaintiff's Complaint is time-barred. Ms. Jullan also states that if the statute of limitations issue comes before the Eighth Circuit Court of Appeals, HUD may consult with the Department of Justice about the possibility of filing an amicus brief. (Id.).

Defendant First Interstate moves to strike the HUD letter. The motion is well-taken and will be granted. HUD is not a party to this action, and has not sought leave to file an amicus brief with this Court. Moreover, Plaintiff failed to assert in opposition to First Interstate's Motion to Dismiss the arguments now raised in HUD's letter. The Court therefore refuses to consider those arguments as a basis for granting relief under Rule 59(e).

Virtually all of the exhibits accompanying Plaintiff's

Motion for Reconsideration were available prior to t he completion of briefing on Defendants' motions, yet Plaintiff failed to present them to the Court at that time. Defendant Fannie Mae moves to strike all exhibits to the Motion for Reconsideration on the grounds that Plaintiff could have presented them earlier, but failed to do so.

Plaintiff appears to concede that most of the exhibits to his motion, including Exhibits 1, 4, and 9, concerning his qualifications for a loan, could have been presented earlier. He argues that the same information was contained on page 17 of Exhibit 2 to his Response to Fannie Mae's Motion for Summary Judgment. Plaintiff failed, however, to draw the Court's attention to this page in his summary judgment briefs. In fact, he offered Exhibit 2 solely to show that he submitted a preliminary loan package to First Interstate, not to demonstrate that he qualified for a Fannie Mae-backed loan. (See Pltf's Resp. to Deft. Fannie Mae's Mtn. for Summ. Judg., ¶16; Pltf's Mem. of Law in Supp. of Resp. to Deft. Fannie Mae's Mtn. for Summ. Judg., ¶31). Therefore the Court finds that Plaintiff did not previously submit to the Court the evidence contained in Exhibits 1, 4, and 9 to his motion for Reconsideration.

Plaintiff did not obtain Exhibit 10 to his Motion for Reconsideration until the April 23, 1996 deposition of Dr. Terrance Jones, Fannie Mae's expert. Pltf's Resp. to Deft. Fannie Mae's Mtn. to Strike, ¶3). Because Exhibit 10 was not available at the time Plaintiff filed his Response to Fannie Mae's Motion for Summary Judgment, Plaintiff argues, he

should be permitted to submit it to the Court along with his Rule 59(e) motion. Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 175 (5th Cir. 1990), cert. denied, 510 U.S. 859 (1993), cited by Plaintiff, is not controlling in this jurisdiction. Moreover, although the Fifth Circuit in Lavespere found that the district court did not abuse its discretion in considering later obtained evidence on a Rule 59(e) motion, the appellate court also noted that a district court is not required to consider such evidence. Plaintiff has failed to show that he was unable to depose Dr. Jones earlier; in fact, Exhibit 2 to the Motion for Reconsideration reveals that Plaintiff knew at least by March 13, 1996 that he wanted to depose Dr. Jones. Plaintiff likewise has failed to show that he was precluded from seeking leave to file Exhibit 10 immediately following the deposition, before the Court's April 29, 1996 ruling on the summary judgment motion. At any rate, Exhibit 10 is merely cumulative of Exhibits 1, 4, and 9, which Plaintiff concededly did not present in opposition to Fannie Mae's Motion for Summary Judgment.

The Court finds that Plaintiff had every opportunity at the summary judgment stage to present the evidence he now submits in support of his Motion for Reconsideration. Therefore Fannie Mae's Motion to Strike the new exhibits will be granted.

Before ruling on Plaintiffs, Motion for Reconsideration, the Court finds it necessary to respond to three points raised therein. First, Plaintiff asserts that Defendant First Interstate waived its right to assert a statute of

limitations defense by failing to raise the issue by motion before answering his Complaint. (Pltf's Mtn. for Reconsid., ¶12). Rule 12(h)(2) plainly states, however, that [a] defense of failure to state a claim... may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." Fed. R. Civ. P. 12(h)(2). The Advisory Committee Notes to the 1966 revision to Rule 12 clarify that certain "more substantial defenses" such as the defense of failure to state a claim "are expressly preserved against waiver by amended subdivision (h)(2) and (3)."

Second, Plaintiff objects to the Court's finding that he failed to seek leave to amend his Complaint until 12 days after the deadline for completion of discovery. Plaintiff asserts that the discovery deadline was extended by the consent of the parties. (See Ex. 2 to Pltf's Mtn. for Reconsid.). The Court's Case Management Order clearly states that deadlines "will be modified only upon a showing of exceptional circumstances." (Feb. 28, 1995 Case Man. Order, at 1). on several occasions, the Court approved certain changes to the Case Management Order. Any additional changes were made at the parties, own risk and without the Court's approval.

Finally, Plaintiff argues that the Court erred in striking the affidavits of Marvin Rausch and Zina Greene on the grounds that Plaintiff failed to designate these individuals as experts on Plaintiff's qualifications for a Fannie Mae-backed loan. It is true that the parties stipulated that they need not

produce the expert reports required by Rule 26 (a) (2) , and that the Court approved that stipulation. (July 11, 1996 Order approving Stip. Mod. of Case Man. Order). However, the parties still agreed to disclose their experts "with a brief summary of their opinions." (Id.). Plaintiff failed to state in his summaries that Mr. Rausch and Ms. Greene would render expert opinions on Plaintiff's qualifications for a loan. Therefore the Court reaffirms its prior determination that the Rausch and Greene affidavits should be stricken.

Because Plaintiff's Motion for Reconsideration and or Motion to Alter or Amend Judgment Under Rule 59(e) merely constitutes a belated attempt to oppose Fannie Mae's summary judgment motion, it will be denied.

Both Defendants request an award of attorney's fees. In a Fair Housing Act case, the Court, "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney' s fee and costs." in 42 U.S. C. § 3 613 (c) (2) . The term "prevailing party" "has the same meaning as such term has" in 42 U.S.C. 9 1988. 42 U.S.C. § 3602 (o) . A prevailing defendant in a 1988 case is entitled to an attorney's fee only if the "'Plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.'" Hughes v. Rowe, 449 U.S. 5, 14 (1980), quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) Defendant First Interstate's contention that the Hughes/ Christiansburg standard for a prevailing defendant's award was overruled by the 1988 amendments to the Fair Housing Act is without merit. See Foster v. Barilow, 6 F.3d 405, 408

(6th 1993) (applying Hughes Christiansburg standard in Fair Housing Act case, and finding that 1988 amendments to Fair Housing Act were intended to parallel language of 42 U.S.C. § 1988). See also Brooks v. Center Park Associates, 33 F.3d. 585, 587 & n.2 (6th Cir. 1994) (applying Hughes /Christiansburg standard in Fair Housing Act case).

"To obtain prevailing party status, a defendant must be able to point to a judicial declaration to its benefit." Marquart v. Lodge 837, 26 F.3d 842, 852 (8th Cir. 1994) An order granting summary judgment on the merits of a plaintiff's claim entitles the moving defendant to prevailing party status. Id. Defendant Fannie Mae clearly is a "prevailing party," because the Court granted summary judgment in-its favor on the merits of Plaintiff's claim.

The Eighth Circuit in Marquart suggested that a defendant does not "prevail" for purposes of an attorney's fee award if it merely persuades a court that the plaintiff's claim is time-barred Marquart 26 F.3d at 852, citing Hoover v. Armco, Inc., 915 F.2d 355, 357 (8th Cir. 1990) ("Asserting a time-barred claim alone does not justify an award of attorney's fees."), cert. denied, 499 U.S. 961 (1991). The Court therefore concludes that Defendant First Interstate was not a "prevailing party" simply by virtue of the fact that it prevailed on the statute of limitations issue.

Even if First Interstate was a "prevailing party," however, it has failed to demonstrate its entitlement to attorney's fees. The Court does not believe that Plaintiff's position on the statute of limitations issue was "frivolous,

unreasonable, or without foundation." Hughes, 449 U.S. at 14. The issue of whether the limitations period was tolled after HUD reopened its investigation of Plaintiff's claim was a novel one, and Plaintiff's position certainly is arguable.

Moreover, even if Plaintiff's argument on the statute of limitations question was "frivolous, unreasonable, or without foundation," First Interstate has failed to document its $334,117.62 attorney's fee request and $105,871.27 expense reimbursement request with sufficient specificity. Counsel simply lists his attorney's fees and expenses on a monthly or multi-monthly basis without any explanation of the tasks performed, the amount of time devoted to any particular tasks, or the purpose of any specific expenses. First Interstate has failed to even attempt to meet its "burden to establish entitlement to a particular award by presenting adequate documentation of its efforts in the litigation." United Healthcare Corp. v. American Trade Ins. Co., Ltd., 88 F.3d 563, 575 (8th Cir. 1996). Counsel asserts that his detailed documentation contains privileged material, and he offers to provide it to the Court in camera. obviously Plaintiff cannot respond to an in camera submission. Because First Interstate has not even attempted to provide summary records, redacting any privileged matters, the Court will deny its Motion for Attorney's Fees. First Interstate has filed no Bill of Costs, and is now beyond the time for doing so. E.D.Mo. 8.03(A).

The Court already has held that Defendant Fannie Mae is a prevailing party for purposes of an attorney's fee award. The question before the Court is whether Plaintiff's Fair

Housing Act claim was "frivolous, unreasonable, or without foundation." Hughes, 449 U.S. at 14. The Court is mindful that "'a prevailing defendant, is entitled to attorney's fees only in very narrow circumstances.'" Marquart, 26 F.3d at 848, quoting Eichman v. Linden & Sons, Inc., 752 F.2d 1246, 1248 (7th Cir. 1985). In fact, the Eighth Circuit in Marquart, cited with approval a district court case recognizing that the Eight Circuit had awarded fees to a prevailing defendant only once in all civil rights cases through 1989. 26 F.3d at 848-49, citing Witzsche v. Jaeger & Haines, Inc., 707 F.Supp. 407, 410-11 & n.2 (W.D. Ark. 1989).

Fannie Mae sought summary judgment on eight grounds, two of which the Court resolved in Plaintiff's favor, one of which the Court resolved in Fannie Mae's favor, and five of which were not reached. The Marquart decision states that if a plaintiff makes out a prima facie case of discrimination, his complaint "cannot be said to be frivolous, unreasonable, or groundless." 26 F.3d at 853. One could argue by implication that if a plaintiff fails to make out a prima facie case, his complaint is frivolous, unreasonable, or groundless.

The Court finds, however, that Plaintiff's position on the dispositive issue, his qualification for a Fannie Mae-backed loan, was not frivolous, unreasonable, or groundless. Plaintiff did present affidavits by two of his experts that he was qualified for a loan. The fact that the Court struck those affidavits or, in the alternative, found that they lacked sufficient foundation, does not detract from the fact that

Plaintiff presented some evidence on this issue.

The Court likewise rejects Fannie Mae's contention that Plaintiff's "lawsuit was frivolous and without foundation from the outset." (Mem. in Supp. of Fannie Mae's Mtn. for Atty Fees, at 2). The Eighth Circuit Court of Appeals obviously found that Plaintiff's Complaint was not frivolous when it reversed this Court's first Order of Dismissal. 984 F.2d 924 (8th Cir. 1993). For the foregoing reasons, the court will deny Fannie Mae's Motion for Attorney's Fees.

Fannie Mae requests $24,838.39 in costs. Attached to Fannie Mae's Motion for Costs and Bill of Costs is an exhaustive summary of Defendant's deposition and copying costs. Plaintiff does not object to the amount of the requested costs. Instead he argues that Fannie Mae is not entitled to costs pursuant to Rule 54(d), which allows costs "[e]xcept when express provision therefor is made in a statute of the United States." Fed. R. Civ. P. 54(d). Since the Fair Housing Act permits a prevailing party to recover attorney's fees and costs, and since a prevailing defendant may recover attorney's fees only if the plaintiff's claims were frivolous, unreasonable, or groundless, Plaintiff argues, the same standard should govern an award of costs to a prevailing defendant. The Eighth Circuit has rejected the argument that the Christiansburg standard applies to an award of costs in favor of a prevailing defendant. Poe v. John Deere Co., 695 F.2d 1103, 1108 (8th Cir. 1982). Therefore this Court finds that Fannie Mae is entitled to recover its costs, even though it has not satisfied the Christiansburg standard. The Court will grant

the Motion for costs and order the Clerk to tax costs in favor of Fannie Mae in the amount of $24,838.39.

ACCORDINGLY,

IT IS HEREBY ORDERED that Defendant First Interstate 12 Commercial Mortgage Company's Motion to Strike [docket #148] is GRANTED.

IT IS FURTHER ORDERED -that Defendant Federal National Mortgage Association's Motion to Strike Exhibits to Plaintiff's "Motion for Reconsideration" [docket #149] is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Reconsideration and or Motion to Alter or Amend Judgment Under Rule 59(e) [docket #0-1 and #0-2, filed on May 9, 1996] is DENIED.

IT IS FURTHER ORDERED that Defendant First Interstate Commercial Mortgage Company's Motion for Attorney's Fees [docket #140] is DENIED.

IT IS FURTHER ORDERED that Defendant Federal National Mortgage Association's Motion for an Award of Attorneys' Fees and Expenses [docket #146] is DENIED.

IT IS FURTHER ORDERED that Defendant Federal National Mortgage Association's Motion for Costs and Bill of Costs [docket #145] is GRANTED.

IT IS FURTHER ORDERED that the Clerk shall tax costs in favor of Defendant Federal National Mortgage Association and against Plaintiff in the amount of $24,838.39.

Dated. this 26th day of August, 1996.

/s/ Jean C. Hamilton

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BRUCE RING,	)	
Plaintiff,	)	
	)	
V.	)	Cause No. 4:93CV2562 JCH
	)	
FEDERAL NATIONAL	)	
MORTGAGE	)	
ASSOCIATION, and	)	
FIRST INTERSTATE	)	
COMMERCIAL	)	
MORTGAGE	)	
COMPANY,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court pursuant to the parties' pretrial motions. This case is set for trial on the May 6, 1996 docket.

FACTS

The undisputed facts in this case are as follows. Plaintiff Bruce Ring is a real estate developer who currently

resides in Florida, and formerly resided in St. Louis, Missouri. Defendant First Interstate Commercial Mortgage Company (First Interstate) is a corporation doing business in Missouri and engaged in the business of financing real estate development. Defendant Federal National Mortgage Association (Fannie Mae) is a federally chartered corporation with its principal place of business in Washington, D.C. – Fannie Mae purchases loans secured by real estate.

As of August, 1989 First Interstate was authorized to originate and sell mortgages to Fannie Mae under the "Delegated Underwriting and Servicing Program" (DUS), which was reserved for loans exceeding $ 1 million. The parties dispute whether First Interstate also was authorized to originate and sell mortgages under Fannie Mae's "Prior Approval Program," which did not require a minimum loan amount. (Ex. 1 to Pltf's Resp. to Fannie Mae's Mtn. for Summ. Judg.).

At all times relevant to this lawsuit, Plaintiff owned six multi-family apartment buildings in North St. Louis City, and one multi-family apartment building in University City, Missouri. Mercantile Bank held first deeds of trust against these seven properties to secure loans. On or about August 7, 1989 Plaintiff contacted Kenneth Green, Assistant Vice President of First Interstate, about the possibility of refinancing the Mercantile Bank loans. Mr. Green sent a preliminary loan package to Joe Marsh, an underwriter with Fannie Mae, and inquired whether Fannie Mae would

consider an application for some or all of the properties under the Prior Approval Loan program. (Ex. 2 to Pltf's Resp. to Fannie Mae's Mtn. for Summ. Judg.).

Plaintiff asserts that Mr. Marsh called Mr. Green prior to August 30, 1989, and stated that Fannie Mae could not purchase the loans, because they did not meet Fannie Mae Is "program." (Ex. 2 to Pltf's Mtn. for Summ. Judg., at 127). Mr. Marsh denies making such a statement to Mr. Green. (Marsh Dep. at 54-58, attached to Fannie Mae's Resp. to Pltf's Mtn. for Summ. Judg.). Instead, he claims that he told Mr. Green that the preliminary loan package contained insufficient information. (Id. at 56-57). The parties agree, however, that on August 30 Mr. Marsh sent Mr. Green a letter stating, "As we discussed, we are unable to accept your request for a loan application for the referenced projects." (Ex. 2 to Pltf's 2 Resp. to Fannie Mae's Mtn. for Summ. Judg.). Mr. Green concluded that Fannie Mae had rejected Plaintiff's loan request. (Ex. 1 to Pltf's Mtn. for Summ. Judg. at 132, 188-89). At his deposition Mr. Marsh denied this allegation, claiming that because Plaintiff had not submitted a formal loan application, Fannie Mae had nothing to reject. (Marsh Dep. at 54-58, attached to Fannie Mae's Resp. to Pltf's Mtn. for Summ. Judg.). Plaintiff concededly did not apply for a loan on a form provided by Fannie Mae.

Richard Pollack, C.P.A., one of Plaintiff's experts, calculated the fair market value and the loan payoff balance on each of the seven properties as of October 1, 1989, the

approximate effective date of an August, 1989 loan:

Address	Fair Market Value	Existing Loan
5328 Delmar Blvd.	$1,288,584	$1,284,277
750 Hamilton Ave.	398,332	340,000
3559 Lindell Blvd.	160,749	136,501
2801 N. Kingshighway	656,921	675,000
5530 Delmar Blvd.	147,475	190,345
6250 Clemens	117,005	139,661
1304 N. Sarah/ 4065 Page	270,849	263,362
TOTAL	$3,039,915	$3,029,146

(Pollack Dep. at 113-14, 116-17, 131-37, and Ex. H, both attached to Fannie Mae's Mtn. for Summ. Judg.).[3] Plaintiff offers no evidence to support his assertion that the foregoing chart does not summarize Mr. Pollack's deposition testimony. (Pltf's Resp. to Fannie Mae's Mtn. for Summ. Judg., ¶45).

According to Keith Kramer, a real estate appraiser and another of Plaintiff's experts, in 1989, lenders in the multifamily market, including First Interstate,' typically required a loan to fair market value ratio of between 70 and 80 percent. (Kramer Dep., at 53, 121-23, attached to Fannie Mae's Mtn. for Sumn. Judg.). Plaintiff disputes Fannie Mae's interpretation of Mr. Kramer's testimony. (Pltf's Resp. to

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[3]The version of Exhibit H which is attached to Fannie Mae's motion for Summary Judgment is missing several pages. On the Court's request, counsel for Fannie Mae has filed a complete version of this exhibit

Fannie Mae's Mtn. for Summ. Judg., ¶46). As Plaintiff notes, Mr. Kramer did state that the loan to Value ratio depended on variables such as amortization, interest rates, and points. (Kramer Dep., at 122, attached to Fannie Mae's Mtn. for Summ. Judg.). Moreover, Mr. Kramer acknowledged that his estimates were based in part on appraisals outside of the St. Louis area. (Id. at 53) Nonetheless, Mr. Kramer clearly stated, "I believe the 75 percent loan to value ratio with a term on these properties of 20 to 25 years with monthly payments would be realistic and could be expected." (Id.). He also testified, "Most of these were definitely in the 70, 80 percent." (Id. at 122).

Based on the fair market value and outstanding loan balance figures prepared by Mr. Pollack, the Court concludes that the loan to value ratios for Plaintiff's seven properties were as follows in October, 1989:

Address	Loan to Value Ratio
5328 Delmar Blvd.	100%
750 Hamilton Ave.	85%
3559 Lindell	85%
2801 N. Kingshighway	103%
5530 Delmar Blvd.	129%
6250 Clemens	119%
1304 N. Sarah/4065 Page	97%

The loan to value ratio for all seven properties taken together was 100 percent. Plaintiff denies the, foregoing loan to value ratios, but provides no evidence to contradict them. (Pltf's

Resp. to Fannie Mae's Mtn. for Summ. Judg., ¶49). Plaintiff also asserts, "Of course, Plaintiff should have at least been afforded the opportunity to make a proposal to Fannie Mae such that Plaintiff could comply with Fannie Mae's loan-to-value requirement. (Id.).

Plaintiff submits affidavits by two of his other experts, Marvin Rausch and Zina Green. Mr. Rausch, a mortgage banking expert, attests as follows:

> I have studied the package of materials sent by Ken Green, on August 7, 1989, to the attention of Joe Marsh at Fannie Mae, and having reviewed the materials, it is my opinion that Mr. Ring applied for, and qualified for a loan from Fannie Mae.

(Ex. 23, ¶2, attached to Pltf's Resp. to Fannie Mae's Mtn. for Summ. Judg.). Ms. Greene is an expert in mortgage lending discrimination and low and moderate income housing. She attests as follows:

> 9. With regard to Bruce Ring's properties in St. Louis, I have personally viewed them, and their surroundings, and have personally viewed photographs of them taken in 1989, at the time of the request for financing through First Interstate and Fannie Mae.
>
> 10. It is my opinion that in August, 1989, most, if not all of Bruce Ring's properties

> were qualified and eligible for Fannie Mae financing based on Fannie Mae's underwriting standards for its prior approval program; and at least one property, at 5328 Delmar may have met Fannie Mae's underwriting standards under its DUS program which requires a minimum loan amount of $1,000,000.

(Ex. 24 to Pltf's Resp. to Fannie Mae's Mtn. for Summ. Judg.).

In reply to the affidavits, Fannie Mae submits the affidavit of Harry Donavon, Vice President of Multifamily Activities for Fannie Mae's Southwest Region. Mr. Donavon attests, "The underwriting guidelines in effect in August of 1989 for multifamily properties provided that the maximum loan to value ratio for base .loan amounts was 80% of the appraised value of the property." (Donavon Aff., ¶9, attached to Fannie Mae's Reply to Pltf's Resp. to Fannie Mae's Mtn. for Summ. Judg.).

On October 7, 1989 Plaintiff wrote a letter to Senator John Danforth, alleging that Fannie Mae had rejected the loan-package because of the geographic location of the subject properties. (Ex. A to Fannie Mae's Mtn. for Summ. Judg.). Plaintiff asked the Senator to investigate possible redlining practices by Fannie Mae. (Id.). Senator Danforth forwarded Plaintiff's letter to Fannie Mae, and requested the agency to respond to Plaintiff's allegations. (Ex. B to Fannie Mae's Mtn. for Summ. Judg.).

Fannie Mae sent a letter to Senator Danforth on December 4, 1989. Fannie Mae denied all allegations of redlining. (Ex. C to Fannie Mae's Mtn. for Summ. Judg.).The agency noted that Plaintiff never had submitted a formal loan application, but explained that an investment officer from Fannie Mae's Southwestern Regional Office had made an exterior inspection of five of the seven properties in August, 1989 and found that they were "not in satisfactory physical condition" and that some units appeared "uninhabitable." (Id. at 2). The investment officer allegedly told First Interstate that Fannie Mae "could not finance these properties in their current physical condition." (Id.). According to, Fannie Mae, First Interstate offered to submit a formal application to Fannie Mae on one or more specific properties if Plaintiff would provide the required financial information, but Plaintiff never provided such information. (Id.). Fannie Mae concluded its letter by saying "[W]e continue to stand ready to review a complete application proposal on a specific property that meets appropriate physical standards and financial criteria." (Id.). Senator Danforth forwarded a copy of Fannie Mae's letter to Plaintiff.

Mr. Green called Plaintiff sometime after December 4, and invited him to submit a loan application for Fannie Mae's consideration. (Pltf's Resp. to Fannie Mae's Mtn. for Summ. Judg., ¶20; Ring Dep. at 205-08, attached to Fannie Mae's Mtn. for Summ. Judg.). Plaintiff stated that he wished to submit an application for the seven properties as a package.

Mr. Green replied that that was not possible. (Ring Dep. at 207-08, attached to Fannie Mae's Mtn. for Summ. Judg.). Plaintiff therefore decided not to submit a formal loan application. (Id. at 208; Pltf's Resp. to Fannie Mae's Mtn. for Summ. Judg., ¶21).

On December 27, 1989 Plaintiff wrote a second letter to Senator Danforth, stating, "It is my sincere belief that without intervention by your office on my behalf the regional Fannie Mae office will not service my projects." (Ex. D to Fannie Mae's Mtn. for Summ. Judg.). Senator Danforth again forwarded the letter to Fannie Mae. (Ex. E to Fannie Mae's Mtn. for Summ. Judg.).

Fannie Mae responded on January 20, once again explaining to the Senator that its regional office had reviewed the preliminary loan package submitted by First Interstate and had determined that it could not finance five of the properties "because their physical condition was not satisfactory and several appeared uninhabitable." (Ex. F to Fannie Mae's Mtn. for Summ. Judg.). Fannie Mae also reiterated that its "regional staff stands ready to review a completed application proposal on a specific property that meets appropriate physical standards and financial criteria." (Id. at 2).Finally, Fannie Mae invited Plaintiff to call either of two employees in its regional office in Dallas to obtain names of other lenders besides First Interstate which had experience with multifamily business. (Id.). Senator Danforth forwarded Fannie Mae's letter to Plaintiff. (Ring Dep. at 217-20,

attached to Fannie Mae's Mtn. for Summ. Judg.). Mr. Ring does not recall contacting either Fannie Mae employee for the names of other lenders. (Id.).

On March 1, 1990 Plaintiff filed suit against Fannie Mae and First Interstate in the Circuit Court for the City of St. Louis. Defendants removed the case to this Court. (Cause No. 90-519-C-7). Plaintiff alleged that Defendants refused to permit him to apply for loans, and thereby violated the Equal Credit Opportunity Act, 15 U.S.C. 1691 et seq.; Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq.; the Fair Housing Act, 42 U.S.C. 9 3601 et seq.; and the National Housing Act, 12 U.S.C. § 1716, and regulations thereunder, 24 C.F.R. §§ 81.16-18.

On May 31, 1990 Plaintiff filed an Amended Complaint seeking injunctive relief. Plaintiff specifically requested the Court to order First Interstate "to permit Bruce Ring to submit an application for financing of the above-described properties and review the properties submitted by Bruce Ring pursuant to Federal statutes and regulations pursuant to the internal lending guidelines of Fannie Mae." (Am. Compl., Cause No. 90-519-C-4). On August 10, 1990 the Honorable Clyde S. Cahill issued an order holding the case in abeyance for 90 days "to allow plaintiff time to formally submit application to defendant Federal National Mortgage Association (Fannie Mae) on each of the properties involved in this action." (August 10, 1990 Order in Cause No. 90-519-C-4). Judge Cahill also ordered Fannie Mae to

"submit a written evaluation in response to plaintiff's applications within 30 days of the receipt of plaintiff's applications." (Id.).

Plaintiff never filed a formal loan application as ordered by Judge Cahill. (Ring Dep., at 247, attached to Fannie Mae's Mtn. for Summ. Judg.). Judge Cahill later held a status conference and inquired why Plaintiff had not submitted loan applications. Plaintiff explained that he could not afford the approximately $177,000.00 in expenses associated with preparing a loan application for First Interstate. (Id. at 247-50). Plaintiff concedes that Fannie Mae had offered to waive the $2,000 application fee for each loan application; that one-half of the $144,000 in points would be refunded at the loan closing; and that the remaining points and appraisal and engineering fees could be included in the loan. (Id. at 248-49, 262-66). Plaintiff also admits that his $4 million net worth in August, 1990 was approximately the same as his net worth in August, 1989 when he approached First Interstate about a loan. (Id. at 251-52). He claims, however, that his cash position had changed "dramatically, because he had pledged most of his assets as collateral for loans. (Id. at 252).

During this period Plaintiff approached Reinlein, Lieser & McGee about the possibility of refinancing his properties. This lender refused to discuss the matter with Plaintiff because of his lawsuit. (Id. at 247, 254-55). Plaintiff made no other efforts to apply for Fannie Mae-backed

financing. (Id. at 254-55).

Plaintiff maintained a "skeleton" maintenance crew at his seven properties through August, 1990, when he abandoned the properties and stopped making mortgage payments to Mercantile Bank. (Ex. 31 to Pltf's Resp. to Fannie Mae's Mtn. for Summ. Judg.). The occupancy rate in Plaintiff's properties began to drop. The parties dispute whether Mercantile Bank offered a three-year extension on Plaintiff's loans, but they agree that no such agreement was finalized. (Ex. M to Fannie Mae's Mtn. for Summ. Judg.; Ex. 27 to Pltf's Resp. to Fannie Mae's Mtn. for Summ. Judg.). In August, 1991 Mercantile Bank and another lender filed an action in Missouri state court for the appointment of a receiver to operate the mortgaged properties. In November, 1991 Mercantile Bank, Mark Twain Bank, and other creditors filed an involuntary bankruptcy petition against Plaintiff and his wife, who moved to Florida.

Plaintiff alleges that Defendants forced him into bankruptcy and caused him to lose his business. Plaintiff concedes, however, that Plaintiff's rental properties sustained losses from a tax perspective from 1981 through 1990.

On March 29, 1991 this Court dismissed all of Plaintiff's claims except his Fair Housing Act claim pursuant to Fed. R. Civ. P. 12(b)(6). (March 29, 1991 Mem. and Order, Cause No. 90-519-C-7). Plaintiff never appealed that Order. The Court ordered Plaintiff to file a Second Amended Complaint which clearly set forth his Fair Housing Act claim.

Plaintiff filed a Second Amended Complaint asserting a disparate treatment claim pursuant to 42 U.S.C. § 3601 et seq. On October 29, 1991 this Court dismissed the Second Amended Complaint for failure to state a claim. (Oct. 29, 1991 Mem. and Order, Cause No. 90-519-C-7). Plaintiff appealed that ruling, and the Eighth Circuit reversed on the grounds that Plaintiff did not need to plead each element of a prima facie case of discrimination in order to survive a motion to dismiss. Ring v. First Interstate Mortgage, Inc., 984 F.2d 924 (8th Cir. 1993).

Plaintiff subsequently dismissed without prejudice his claims in this Court and refiled them in the United States District Court for the District of Columbia. (Cause No. 93-1901). On October 28, 1993 that Court granted Defendant Fannie Mae's Motion to Transfer Venue back to this Court. Upon its return the case was assigned Cause No. 4:93CV2562.

Plaintiff was granted leave to file an Amended Complaint in this Court on May 4, 1995. Count I of the Amended Complaint asserts in relevant part that Defendants discriminatorily denied him an opportunity to apply for loans on the basis of the "racial composition of the tenants of the properties, and the racial composition of the surrounding communities." (Am. Compl., ¶10). Plaintiff seeks $30 million in compensatory damages for violation of the Fair Housing Act, 42 U.S.C. § 3605. In Count II Plaintiff requests $500,000 in damages for mental anguish and

emotional distress arising out of the same discriminatory acts. In Count III Plaintiff requests $200 million in punitive damages. Count III specifically alleges as follows:

> [B]oth defendants First Interstate and Fannie Mae have engaged in a pattern and/or practice of mortgage redlining, which is discriminatory, and such conduct is intentional, willful and wanton. In this regard, plaintiff would show that both defendants have a history of not making loans in black areas of North St. Louis, and have engaged in a pattern and/or practice of redlining the black areas of North St. Louis, and in redlining minority neighborhoods in the United States.

(Amended Complaint ¶21).In Count IV Plaintiff requests attorney's fees, court costs, and other relief.

PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

On January 8, 1996 the Court issued an Order which, among other things, found that Plaintiff had pleaded only a disparate treatment claim in his Amended Complaint. Although the punitive damage request in Count III mentions a "pattern and/or practice" of mortgage redlining, the Court found that Plaintiff failed to describe the facially neutral policy or practice in sufficient detail to put the defendant "on notice of the specific charges levied against it," as required by Pulla v. Amoco Oil Co., 72 F.3d 648, 658 (8th Cir. 1995).

Plaintiff now seeks leave to amend his Complaint again to assert a disparate impact claim. Plaintiff specifically requests leave to add the following language to his Amended Complaint:

> That Defendant Federal National Mortgage Association's loan patterns and practices and/or policies with regard to the purchasing of loans, making of loans, and underwriting of loans, while facially neutral in their treatment of different races, in fact, fall more harshly upon one group than another, to wit, minority groups, without adequate justification. Therefore, these policies and practices result in a discriminatory effect on minority groups including African Americans. Additionally and alternatively, Plaintiff alleges that Defendant Federal National Mortgage Association in discriminating against low-moderate and moderate income areas, neighborhoods, and buildings, results in a facially neutral policy or practice that has a disparate impact and/or discriminatory effect on racial minority groups in the city of St. Louis, and in the United States, to wit, racial minorities, including African Americans living in low-moderate and moderate income areas. In fact, such facially neutral policy

> and/or practice has a disparate impact on racial minority groups.

(Pltf's Mtn. for Leave to Amend, at 3-4).

Rule 15(a) of the Federal Rules of Civil Procedure permits a party "to amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a) (emphasis added). The Supreme Court has held,

> In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962).

Applying the factors articulated in Foman, the Court finds that Plaintiff's request for leave to amend should be denied. Plaintiff filed his first Complaint in this case in the St. Louis Circuit Court in March, 1990. Following removal, Plaintiff amended his Complaint in May, 1990. (Cause No. 90-519-C-7). In March, 1991 this Court dismissed all counts

of the Amended Complaint except the Fair Housing Act claim, and ordered Plaintiff to amend a third time. The Eighth Circuit reversed this Court's October, 1991 Order dismissing the third version of Plaintiff's Complaint. Following remand, Plaintiff dismissed Cause No. 90-519-C-7 and refiled a fourth version of his Complaint in the District Court for the District of Columbia in September, 1993. The case was transferred back to this Court, and Plaintiff was granted leave to file a fifth version of his Complaint in April, 1995.

Plaintiff now seeks leave to amend his Complaint a sixth time, nine months after the April 15, 1995 deadline for amendment of pleadings contained in the Court's February 28, 1995 Case Management Order, twelve days after the deadline for completion of discovery, on the same day as the dispositive motion deadline, and four months before trial. Plaintiff argues that he could not conclusively establish a disparate impact claim until completion of Lynne Bellew' s deposition on January 5, 1996. (Pltf's Mem. in Supp. of Mtn. for Leave to Amend, ¶73). He concedes, however, that as early as June 2, 1995 he identified Zina Greene as an expert who would offer "opinions with regard to Fannie Mae's underwriting standards having a discriminatory effect." (Ex. 11 to Pltf's Mem. in Supp. of Mtn. for Leave to Amend, ¶9). Plaintiff also designated John Farley as an expert who would address "disparate impact on neighborhoods such as St. Louis because of discriminatory housing and lending practices."

(Id., ¶12). Although Plaintiff's preliminary expert witness designation came after the deadline for amendment of pleadings, Plaintiff could have sought leave to amend in June, 1995 as soon as he had knowledge of a potential disparate impact claim.

Plaintiff argues that Defendants have been on notice of a disparate impact claim for some time, because many of the depositions in this case focused on Fannie Mae's alleged "failure to do low-moderate housing" and to "comply with their charter." (Pltf's Reply to Fannie Mae's Resp. to Pltf's Mtn. for Leave to Amend, ¶48). As Plaintiff notes, however, statistical evidence can be relevant to a disparate treatment claim. Minority Employees at NASA (MEAN) v. Beggs, 723 F.2d 958, 962 (D.C. Cir. 1983); Davis v. Califano, 613 F.2d 957, 962 (D.C. Cir. 1979). Accord Goetz v. Farm Credit Services, 927 F.2d 398, 405 (8th Cir. 1991); MacDissi v. Valmont Industries, Inc., 856 F.2d 1054, 1058 (8th Cir. 1988).The Eighth Circuit has held that, "[A] district court is not required to grant a motion to amend on the basis of some evidence that would be relevant to the new claim if the same evidence was also relevant to a claim originally pled." Gamma-10 Plastics v. American President Lines, Ltd., 32 F.3d 1244, 1256 (8th Cir. 1994), cert. denied, 115 S.Ct. 1270 (1995). Accord Pulla, 72 F.3d at 658.

Fannie Mae will be prejudiced by an amendment at this juncture, because it has designated no expert to render an opinion on a disparate impact claim. Plaintiff responds that

Fannie Mae has over 3,000 employees, and that many of these employees should be qualified to address a disparate impact claim. (Pltf's Reply to Fannie Mae's Resp. to Pltf's Mtn. for Leave, to Amend, ¶29). Plaintiff also asserts that Fannie Mae's designated expert, Dr. Terrance Jones, is a "nationally known discriminatory effect expert." (Id. ¶30). Assuming that Fannie Mae could obtain expert testimony on a disparate impact claim, the Court finds that the agency has not had an opportunity to develop its position on such a claim, or to file a dispositive motion. The Court therefore will deny Plaintiff's Motion for Leave to Amend Complaint.[4]

DEFENDANT FIRST INTERSTATE'S
MOTION TO DISMISS

Defendant First Interstate moves to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction pursuant to

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[4]Plaintiff's disparate impact claim is unlikely to succeed on the merits, because Plaintiff has failed to identify a specific policy or practice which is neutral on its face but has a disparate impact on members of a protected group, Pulla, 72 F.3d at 658, and, as explained below, the statute of limitations has expired. However, "[l]ikelihood of success on the new claim is no basis for denying an amendment unless the claim asserted therein is clearly frivolous." Gamma-10 Plastics v. American President Lines, Ltd., 32 F.3d 1244, 1256 (8th Cir. 1994), cert. denied, 115 S.Ct. 1270 (1995). Accord Buder v. Merrill, Lynch, Pierce, Fenner & Smith, 644 F.2d 690, 695 (8th Cir. 1981). At this juncture the Court cannot say that a disparate impact claim would be clearly frivolous. Therefore the Court's ruling does not rest on the merits of Plaintiff's claim.

Fed. R. Civ. P. 12(h)(3) As grounds for this request, Defendant asserts that Plaintiff's Fair Housing Act claim is time-barred.

An "aggrieved person" may challenge a discriminatory housing practice by filing a lawsuit in federal or state court. 42 U.S.C. § 3613. A two year statute of limitations governs such claims. Id. § 3613 (a)(1)(A).In addition or in the alternative, an aggrieved person may file a discrimination complaint with the Secretary of Housing and Urban Development (HUD). Id. § 3610. The Secretary on his own initiative also may file such a complaint. A one year statute of limitations governs discrimination complaints. Id. § 3610 (a)(1)(A)(i). The HUD Secretary must complete his investigation of a discrimination complaint within 100 days, or provide a written explanation for his failure to do so. Id. § 3610 (a) (1) (B) (iv) , (C). The two year statute of limitations on court actions is tolled for any period during which a complaint is pending before HUD. Id. § 3613(a)(1)(B).

This Court has found no cases discussing whether the two year statute of limitations on court actions under the Fair Housing Act is jurisdictional. Courts interpreting the Fair Housing Act do, however, rely on cases interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. See Ring v. First Interstate Mortgage Co., Inc., 984 F.2d 924, 926 (8th Cir. 1993). The Eighth Circuit Court of Appeals has held that the 90 day limitations period on Title VII claims is not jurisdictional. Winbush v. State of Iowa by Glenwood

State Hospital, 66 F.3d 1471, 1477 (8th Cir. 1995); Hill v. John Chezik Imports, 869 F.2d 1122, 1124 (8th Cir. 1989). Following this precedent, the Court concludes that the two year statute of limitations on Fair Housing Act claims under 42 U.S.C. § 3613 is not jurisdictional. Therefore the, question presented is not whether the Court has jurisdiction over Plaintiff's claim,[5] but whether Plaintiff has stated a claim under Fed. R. Civ. P. 12(b)(6).

First Interstate attaches to its motion several exhibits. Plaintiff attached an exhibit to his response, and First Interstate submitted additional exhibits along with its reply brief. "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b).

The Court need not give affirmative notice of its intention to convert a 12 (b) (6) motion into a motion for

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[5]The Court therefore need not address Plaintiff's contention that First Interstate waived its defense of lack of subject matter jurisdiction by not asserting it in its Answer to Plaintiff's Amended Complaint. This argument is meritless in any event, since the Court must dismiss an action "[w] henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter. . ." Fed. R. Civ. P. 12(h)(3).

summary judgment if the parties have constructive notice of such intention. Madewell v. Downs, 68 F.3d 1030, 1048 (8th Cir. 1995). Constructive notice may be present "where the nonmoving party has submitted materials outside of the pleadings in support of its resistance. . ., or where the nonmoving party has an adequate opportunity to respond to the summary judgment motion and there is a lack of any showing that any material facts were disputed or missing from the record." Id., citing Davis v. Johnson Controls, Inc., 21 F.3d 866, 867 (8th Cir.), cert. denied, 115 S.Ct. 426 (1994), and Angel v. Williams, 12 F.3d 786, 788-89 (8th Cir. 1993).

Eighth Circuit panels disagree, however, as to whether a district court must give affirmative notice before converting a 12(b)(1) motion into a motion for summary judgment. Compare Layton v. United States, 919 F.2d 1333, 1335 (8th Cir. 1990) (court should notify parties of intent to convert 12 (b) (1) motion into motion for summary judgment) with Cox v. Fritz, 56 F.3d 68, 1995 WL 324539 (8th Cir. June 1, 1995) (unpublished) (affirming summary judgment where nonmoving parties had notice that court was relying on matters outside pleadings, because Rule 12(b)(1) permits such reliance, and because nonmovants presented evidence of their own).

Given that Plaintiff submitted matters outside the pleadings along with his response, that the factual record on the time bar issue appears fully developed, that trial is

approaching rapidly, and that the Court will dispose of this case on alternative grounds well, the Court will convert First Interstate's motion into one for summary judgment, and will rule on the merits at this time. If Plaintiff wishes to present any additional evidence on the statute of limitations issue, he may do so by filing a motion to reconsider within twenty (20) days of the date of this Memorandum and order. If Plaintiff elects to file any additional evidence, First Interstate shall have five days to reply to it.

The Court may grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions, on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The substantive law determines which facts are critical and which are irrelevant. Only disputes over facts that might affect the outcome will properly preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is not proper if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id.

A moving party always bears the burden of informing the Court of the basis of its motion. Celotex, 477 U.S. at 323. Once the moving party discharges this burden, the nonmoving party must set forth specific facts demonstrating that there is a dispute as to a genuine issue of material fact, not the "mere

existence of some alleged factual dispute." Fed. R. Civ. P. 56(e); Anderson, 477 U.S. at 247. The nonmoving party may not rest upon mere allegations or denials of his pleading. Anderson, 477 U.S. at 256.

In passing on a motion for summary judgment, the Court must view the facts in the light most favorable to the nonmoving party, and all justifiable inferences are to be drawn in his favor. Id. at 255. The Court's function is not to weigh the evidence but to determine whether there is a genuine issue for trial. Id. at 249.

The undisputed facts show that Plaintiff filed a discrimination complaint with HUD on April 19, 1990. (Ex. 1 to Pltf's Resp. to First Interstate's Mtn. to Dismiss.). HUD closed its investigation on February 27, 1992, following this Court's October 29, 1991 Order dismissing Plaintiff's Fair Housing Act claim. HUD explained that it was required to close the investigation pursuant to Section 810(g)(4) of the Fair Housing Act, which provides:

> The Secretary may not issue a charge under this section regarding an alleged discriminatory housing practice after the beginning of a trial of a civil action commenced by the aggrieved party under an Act of Congress or a State law, seeking relief with respect to that discriminatory housing practice.

42 U.S.C. § 3610(g)(4). (Ex. A to First Interstate's Reply to

Pltf's Resp. to First Interstate's Mtn. to Dismiss.).

HUD reopened its investigation of Plaintiff's complaint on March 16, 1993, following the Eighth Circuit's reversal of this Court's Order of dismissal. (Ex. B to First Interstate's Reply to Pltf's Resp. to First Interstate's Mtn. to Dismiss). That investigation is still pending. (Ex. 1 to Pltf's Resp. to First Interstate's Mtn. to Dismiss).

Plaintiff dismissed without prejudice his first lawsuit in this Court on August 11, 1993, and refiled his claim in the United States District Court for the District of Columbia on September 10, 1993. "A dismissal without prejudice does not toll a statute of limitation." Garfield v. J.C. Nichols Real Estate, 57 F.3d 662, 666 (8th Cir.), cert. denied, 116 S.Ct. 380 (1995), citing Simons v. Southwest Petro-Chem, Inc., 28 F.3d 1029, 1030 (10th Cir. 1994).

> Indeed, its effect is just the opposite once a dismissal without prejudice is entered and the pending suit is dismissed, it is as if no suit had ever been filed.

Garfield, 57 F.3d at 666, citing Smith v. Dowden, 47 F.3d 940, 943 21(8th Cir. 1995).

According to Plaintiff's damages expert, Richard Pollack, Plaintiff's cause of action accrued on or about October 1, 1989, which is the approximate date an August, 1989 loan would have been effective. (Ex. B to First Interstate's Mtn. to Dismiss). Mr. Pollack calculated the present value of Plaintiff's damages as of that date. (Ex. C to

First Interstate's Mtn. to Dismiss). Plaintiff "takes exception" to the accrual date used by Mr. Pollack, but he provides the Court with no alternative date. (Pltf's Supp. Resp. to First Interstate's Mtn. to Dismiss, ¶11). The Court finds that the only other possible accrual date would be in August, 1989, when Fannie Mae and First Interstate allegedly rejected Plaintiff's preliminary loan package. At the latest, therefore, Plaintiff's cause of action accrued on October 1, 1989.

The period between the accrual date and the September, 1993 lawsuit lasted for 1,439 days. Were it not for HUD's investigation, Plaintiff's lawsuit clearly would be time-barred. The 679 day period of HUD's initial investigation from April 20, 1990 to February 27, 1992 must be excluded from the statutory period pursuant to 42 U.S.C. § 3613 (a) (1) (B) , leaving 760 days, which is 30 days beyond the statute of limitations.

The question before the Court is whether the 177 day period of HUD's second investigation also should be excluded from the statutory period pursuant to 42 U.S.C. § 3613(a)(1)(B). If it is excluded, Plaintiff's September, 1993 lawsuit was timely. If it is not excluded, the lawsuit was untimely.

"Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider." Trujillo v. General Electric Co., 621 F.2d 1084, 1086 (10th Cir. 1980). "Any implicit authority to reconsider, however,

must be limited by the original grant of authority." Concerned Citizens of Bridesburg v. United States Environmental Protection Agency, 836 F.2d 777, 786(34, Cir. 1987). The Equal Employment Opportunity Commission (EEOC) for example, has express authority to reconsider a determination of reasonable cause or no reasonable cause, if the agency notifies both parties within 90 days of receipt of its determination of its intent to reconsider the issue. 29 C.F.R. §§ 1601.19(b), 1601.21(b). See Jackson v. Richards Medical Co., 961 F.2d 575, 580-85 (6th Cir. 1992); Lute v. Singer Co., 678 F.2d 844, 846-47 (9th Cir. 1982), modified on other grounds, 696 F.2d 1266 (1983); Trujillo, 621 F.2d at 1086-87; Gonzalez v. Firestone Tire Rubber Co., 610 F.2d 241, 246 (5th Cir. 1980).

In the absence of such statutory or regulatory authority, courts have refused to toll a statute of limitations based on an agency's reconsideration of a prior determination. The Court of Appeals for the District of Columbia, for example, found that a Title VII claim was time-barred even though the EEOC reconsidered its previous no cause determination and purported to revive the plaintiff's right to sue, where the reconsideration came over 90 days after the initial no cause determination Dougherty v. Barry, 869 F.2d 605, 610-11 (D.C. Cir. 1989). See also Cleveland v. Douglas Aircraft Co., 509 F.2d 1027, 1030 (9th Cir. 1975) (affirming dismissal of Title VII claim as beyond the statute of limitations, because EEOC had no authority to issue a second

right to sue letter); Ford v. General Motors Corp., 452 F.Supp. 355, 357 (E.D. Mo. 1978) (same).

Plaintiff has failed to cite any statute or regulation giving HUD express authority to reopen an investigation after terminating it. The Fair Housing Act itself undermines any such argument, because it precludes the HUD Secretary from filing a complaint more than one year after any alleged discriminatory practice, and it requires the Secretary to complete his investigation of any charge within 100 days or provide a written explanation of his failure to do so. 42 U.S.C. §§ 3610(a)(1)(A)(i), (B)(iv), (C).

This case most closely resembles McCray v. Corry Mfg. Co., 61 F.3d 224, 228-29 (3d Cir. 1995), in which the Court refused to toll the statute of limitations on an age discrimination claim simply because the EEOC reconsidered and reaffirmed its no cause determination. The Court noted that Congress had extended the Title VII reconsideration regulations, 29 C.F.R. §§ 1601.19(b), 1601.21 (b) , to claims arising under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. McCray, 61 F.3d at 228. Because Congress had elected not to extend these regulations to claims arising under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 et seq., the court concluded that the EEOC's reconsideration did not toll the limitations period on the plaintiff's ADEA claim. Id.

This Court likewise concludes that the statute of limitations governing Plaintiff's Fair Housing Act claim was

not tolled simply because HUD reopened its investigation of the claim. The Court will grant summary judgment for First Interstate on the statute of limitations issue.

Although Defendant Fannie Mae has not joined in First Interstate's motion, the Court finds that Plaintiff's claim against Fannie Mae is time-barred as well. Because Plaintiff "was given sufficient advance notice and an adequate opportunity to demonstrate why summary judgment should not be granted" on this issue, the Court will grant summary judgment sua sponte for Fannie Mae on the statute of limitations issue. Shur-Value Stamps, Inc. v. Phillips Petroleum Co., 50 F.3d 592, 594 (8th Cir. 1995), quoting Interco Inc. v. National Sur. Corp., 900 F.2d 1264, 1269 (8th Cir. 1990). Accord Madewell v. Downs, 68 F.3d 1030, 1048 (8th Cir. 1995). If Plaintiff elects to submit additional evidence on the statute of limitations issue by way of a motion to reconsider, Fannie Mae may have five days to reply to such evidence.

DEFENDANT FANNIE MAE'S
MOTION FOR SUMMARY JUDGMENT

Although the statute of limitations issue resolves this case, the Court in an abundance of caution also will address Defendant Fannie Mae's Motion for Summary Judgment. Before addressing the merits of the motion, the Court must address Plaintiff's surprising assertion that his Motion for Leave to Amend "bars granting of Defendant's Motion for Summary Judgment." (Pltf's Mem. in Supp. of Resp. to

Fannie Mae's Mtn. for Summ. Judg., at 4). The two cases cited by Plaintiff merely state that a court should not grant summary judgment before ruling on a pending motion to amend. Ellison v. Ford Motor Co., 847 F.2d 297, 300 (6th Cir. 1988); Marks v. Shell Oil Co., 830 F.2d 68, 69 (6th Cir. 1987). Because the Court already has considered and denied Plaintiff's Motion for Leave to Amend, these cases are inapposite.

The Fair Housing Act (FHA) confers standing on any "aggrieved person" to "commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice . . . to obtain appropriate relief with respect to such discriminatory housing practice . . . " 42 U.S.C. § 3613(a) (1) (A). An "aggrieved person" is defined as "any person who - (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." Id. § 3602(i).

> Section 805 of the FHA provides in relevant part,
>
> It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial

status, or national origin.

Id. § 3605 (a). The phrase "residential real estate-related transaction" includes "[t] he making or purchasing of loans or providing other financial assistance - (A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or (B) secured by residential real estate." Id. § 3605(b)(1).

In order to establish a prima facie case of disparate treatment under Section 805, a plaintiff generally must show:

> (1) that he was a member of a protected class; (2) that he applied for and qualified for a loan from Defendants; (3) that the loan was rejected despite his qualifications; and (4) that Defendants continued to approve loans for applicants with qualifications similar to those of Plaintiff.

Ring, 984 F.2d at 926. Accord Michigan Protection and Advocacy Service, Inc. v. Babin, 18 F.3d 337, 346 (6th Cir. 1994); Secretary, United States Dept. of Housing & Urban Development ex rel. Herron v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990); Bell v. Mike Ford Realty Co., 857 F.Supp. 1550, 1556 (S.D. Ala. 1994); Hickson v. Home Federal of Atlanta, 805 F.Supp. 1567, 1571-72 (N.D. Ga. 1992), aff'd, 14 F.3d 59 (11th Cir. 1994). If the plaintiff makes out a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action. Ring, 984 F.2d at 926; Bell, 857 F.Supp. at 1556. If the defendant meets this burden, the plaintiff then must prove that the

defendant's articulated reason is pretextual. Bell, 857 F.Supp. at 1556.

Fannie Mae asserts that it is entitled to summary judgment for any or all of the following reasons: 1) Plaintiff lacks standing,[6] 2) Plaintiff is not a member of a protected class, 3) Plaintiff never applied for financing from Fannie Mae, 4) Plaintiff was not qualified for Fannie Mae financing, 5) Fannie Mae never rejected any loan application from Plaintiff, 6) No similarly situated borrowers received Fannie Mae financing, 7) Plaintiff cannot establish damages, and 8) Plaintiff failed to mitigate.

Congress intended standing under the Fair Housing Act "'to extend to the full limits under Article III.'" Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982), quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 103 n.9 (1979). The Supreme Court has held on several occasions that non-minority individuals have standing under the Fair Housing Act to argue that housing discrimination against members of minority groups injured them in some manner. See Havens, 455 U.S. at 376-77; Gladstone, 441 U.S. at 115-16; Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211-12 (1972).

Fannie Mae argues that these cases were overruled by the 1988 amendments to the Fair Housing Act. Several courts

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[6]Fannie Mae makes this argument for the first time in its Reply Memorandum of Law in Support of its Motion for Summary Judgment.

have held, to the contrary, that the 1988 amendments actually codified the foregoing Supreme Court cases in order to ensure a broad standing rule under the FHA. Gorski v. Troy, 929 F.2d 1183, 1189 (7th Cir. 1991) ("a Plaintiff suing pursuant to the FHA need not be a member of the class that was the object of discrimination to satisfy the injury-in-fact requirement."); Favors v. MAO Management Corp., 753 F.Supp. 941, 944 (N.D. Ga. 1990) ("With the 1988 amendments to the Fair Housing Act, Congress intended to improve private persons' ability to enforce the anti-discriminatory proscriptions contained in the statute."). See also Mountain Side Mobile Estates v. Secretary of HUD, 56 F.3d 1243, 1249 (10th Cir. 1995) (definition of "aggrieved person" "has been applied to individuals who have not themselves been members of one of the classes protected by the FHA"); Blackwell, 908 F.2d at 873 (same); Oak Ridge Care Center v. Racine County, Wis., 896 F.Supp. 867, 873 (ED. Wis. 1995) (same); Kessler Institute for Rehabilitation v. Essex Fells Mayor, 876 F.Supp. 641, 651 (D. N.J. 1995) (same). The Court finds that Plaintiff does have standing under the Fair Housing Act, because he "claims to have been injured by a discriminatory housing practice" against members of minority groups, and therefore qualifies as an aggrieved person." 42 U.S.C. §§ 3602(i), 3613(a)(1)(A).

Fannie Mae's second argument in favor of summary judgment is that Plaintiff Bruce Ring is not a member of a "protected class," because he is Caucasian, and that he cannot

satisfy this element of a prima facie case. The prima facie standard "varies depending upon the facts of the particular case - thus, there is no 'inflexible formulation'. . ." Ring, 984 F.2d at 927, citing International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977)."The prima facie case requirement 'was never intended to be rigid, mechanized, or ritualistic.'" Ring, 984 F.2d at 927, quoting United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983).The Fifth Circuit in Woods-Drake v. Lund, 667 F.2d 1198, 1201-02 (5th Cir. 1982), not only held that a white tenant had standing under the Fair Housing Act, but also found that the tenant was entitled to damages, because his landlord evicted him for inviting black guests to his apartment. The court necessarily found that the tenant made out a prima facie case even though he was not a member of a protected class. See also Blackwell, 908 F.2d at 873 (affirming decision of HUD administrative law judge to award damages to white lessees/home purchasers who were forced to relocate during investigation of seller's discrimination against black purchasers).

This Court concludes that Plaintiff in the present case may make out a prima facie case by showing that his tenants would have been members of a racial minority group. Fannie Mae has offered no evidence demonstrating that Plaintiff's tenants would not have been members of a minority group. Therefore summary judgment on this issue is not warranted.

The bulk of Fannie Mae's motion is devoted to the

argument that Plaintiff fails to make out a prima facie case because he never applied for Fannie Mae financing. The undisputed evidence shows that Plaintiff submitted a preliminary loan package to First Interstate, which was forwarded to Fannie Mae; Fannie Mae refused to consider a loan application on the seven properties taken together; and Plaintiff refused to submit a formal application on one or more qualifying properties, even after Judge Cahill gave him an opportunity to do so. Plaintiff contends that he applied for the loans by submitting the preliminary package, and that a formal application would have been a "futile gesture." Pinchback v. Armistead Homes Corp., 907 F.2d 1447, 1450-52 (4th Cir.), cert. denied, 498 U.S. 983 (1990). Defendant argues that Plaintiff did not apply for a loan and that, given Plaintiff's multiple letters to Senator Danforth and Judge Cahill's order permitting him to apply for a loan, Plaintiff could not have reasonably believed that an application would be futile, as required by Pinchback, 907 F.2d at 1449.

The Court need not decide whether Plaintiff's preliminary loan package qualified as an "application" for purposes of his prima facie case, or whether a formal application would have been futile, because Plaintiff has failed to demonstrate a material factual dispute as to whether he was qualified for a Fannie Mae-backed loan from First Interstate. Therefore the Court makes no ruling on Fannie Mae's third and fifth grounds in support of its Motion for Summary Judgment.

Plaintiff's own expert, Keith Kramer, testified at his deposition that in 1989, lenders in the multifamily market, including First Interstate, required a loan to fair market value ratio of between 70 and 80 percent. (Kramer Dep., at 53, 121-23). Another of Plaintiff's experts, Richard Pollack, calculated the loan balances and fair market value of Plaintiff's seven properties in 1989. (Pollack Dep. at 113-14, 116-17, 131-37, and Ex. H, both attached to Fannie Mae's Mtn. for Summ. Judg.).[7] Based on Mr. Pollack's figures, the Court has found that the loan to fair market value ratios of Plaintiff's properties ranged from 85 percent to 129 percent, and that ratio for the properties taken together was 100 percent.

In response to this evidence, Plaintiff presents the affidavits of Marvin Rausch and Zina Green. Mr. Rausch attests that after reviewing the preliminary loan package, he believes that "Mr. Ring applied for, and qualified for a loan from Fannie Mae." (Ex. 23, ¶2, attached to Pltf's Resp. to Fannie Mae's Mtn. for Summ. Judg.). Ms. Greene attests that in her opinion, "most, if not all of Bruce Ring's properties were qualified and eligible for Fannie Mae financing based on Fannie Mae's underwriting standards for its prior approval program; and at least one property, at 5328 Delmar may have met Fannie Mae's underwriting standards under its DUS program which requires a minimum loan amount of

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[7]See supra note 1.

$1,000,000."(Ex. 24 to Pltf's Resp. to Fannie Mae's Mtn. for Summ. Judg.).

Fannie Mae moves to strike both affidavits. (Fannie Mae's Reply to Pltf's Resp. to Fannie Mae's Mtn. for Summ. Judg. , 153, at 15-21). The motion is well taken. Plaintiff did not designate Mr. Rausch or Ms. Greene to provide an expert opinion concerning Plaintiff's qualifications for Fannie Mae financing. (Ex. I, ¶¶2, 9, attached to Fannie Mae's Mtn. for Summ. Judg.). The Court's February 28, 1995 Case Management Order, amended on July 20, 1995, required Plaintiff to disclose his expert witnesses and provide the reports required under Fed. R. Civ. P. 26(a) (2) no later than October 20, 1995. Although Plaintiff identified Mr. Rausch and Ms. Greene as experts, he failed to disclose their intention to testify as to Plaintiff's qualifications for Fannie Mae financing. Therefore such testimony is barred under Fed. R. Civ. P. 37(c)(1) ("A party that without substantial justification fails to disclose information required by Rule 26(a) . . . shall not, unless such failure is harmless, be permitted to use as evidence . . . on a motion any witness or information not so disclosed.").

Moreover, the affidavits do not lay a sufficient foundation for the affiants' opinions that Mr. Ring's properties qualified for Fannie Mae financing. Neither Mr. Rausch nor Ms. Greene appears to have any familiarity with Fannie Mae's underwriting standards or any personal knowledge of the loan to fair market value ratios for Plaintiff's properties. Therefore

the affidavits are insufficient under Fed. R. Civ. P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.").

Finally, Mr. Rausch's affidavit contradicts his deposition testimony. Mr. Rausch testified at his deposition that he had not studied the preliminary loan package sent to Fannie Mae, and that he could only presume to know its contents. (Rausch Dep., at 121-27, attached to Fannie Mae's Reply to Pltf's Resp. to Fannie Mae's Mtn. for Summ. Judg.). Mr. Rausch further stated during his deposition that he had no opinion as to whether Plaintiff qualified for a Fannie Mae loan. (Id. at 130; see also Rausch Dep. at 116-19, 189-91, attached to Fannie Mae's Reply to Pltf's Resp. to Fannie Mae's Mtn. for Summ. Judg.). Plaintiff cannot now submit Mr. Rausch's contrary affidavit simply to avoid summary judgment. See Camfield Tires, Inc. v. Michelin Tire Corp., 719 F.2d 1361, 1365 (8th Cir. 1983) ("If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own earlier testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."). For the foregoing reasons, the Court will strike the affidavits of Mr. Rausch and Ms. Greene.

Even if the Court did not strike the affidavits, Fannie Mae demonstrates through the affidavit of Harry Donavon,

Vice President of Multifamily Activities for Fannie Mae's Southwest Region, that there is no material factual dispute as to Plaintiff's qualification for Fannie Mae financing. Mr. Donavon attests, "The underwriting guidelines in effect in August of 1989 for multifamily properties provided that the maximum loan to value ratio for base loan amounts was 80% of the appraised value of the property." (Donavon Aff., ¶9, attached to Fannie Mae's Reply to Pltf's Resp. to Fannie Mae's Mtn. for Summ. Judg.).

Because Mr. Donavon's affidavit was served along with Fannie Mae's reply brief, Plaintiff did not have an opportunity to rebut it. Plaintiff has demonstrated throughout the course of this litigation that he is capable of requesting leave to file documents not specifically authorized by the Federal Rules. (See Pltf's Jan. 29, 1996 Supp. to Mtn. for Leave to Amend Compl.; Pltf's Feb. 6, 1996 Memorandum to Clerk; Pltf's Feb. 6, 1996 Supp. Resp. to First Interstate's Mtn. to Dismiss; Pltf's Feb. 14, 1996 Memorandum for Clerk). Plaintiff did not request leave to supplement his Response to Fannie Mae's Motion for Summary Judgment. Even if the Court were to disregard Mr. Donavon's affidavit, however, Fannie Mae has demonstrated, through the testimony of Plaintiff's own experts, the absence of a material factual dispute as to whether Plaintiff was qualified for Fannie Mae financing in 1989.

Because Plaintiff fails to demonstrate a factual dispute as to this element of his prima facie case, the Court need not

reach the sixth, seventh, and eighth grounds supporting Fannie Mae's Motion for Summary Judgment. Fannie Mae's motion will be granted.

Although First Interstate did not join in Fannie Mae's motion, the Court believes that First Interstate would be entitled to summary judgment not only on the statute of limitations issue, but also on the loan qualification issue. Because Plaintiff "'was is given sufficient advance notice and an adequate opportunity to demonstrate why summary judgment should not be granted'" on this issue, the Court in the alternative will grant summary judgment sua sponte for First Interstate on the issue of Plaintiff's qualification for Fannie Mae-backed financing. Shur-Value Stamps, 50 F.3d at 594, quoting Interco, 900 F.2d at 1269.

The Court makes no determination at this time as to whether Defendants are entitled to attorney's fees. See 42 U.S.C. 3613 (c) (2); Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (prevailing defendant entitled to fees only if "plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"). Defendants may file a motion for attorney's fees no later than twenty (20) days of the date of this Memorandum and Order. E.D.Mo. L.R. 8.02 (effective January 1, 1996).

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff moves for partial summary judgment on the Third and Fourth Affirmative Defenses asserted in both

Defendants' Answers. For their Third Affirmative Defense, Defendants assert that Plaintiff is estopped from pursuing his claim because he did not apply for a loan. For their Fourth Affirmative Defense, Defendants argue that by failing to apply for a loan, Plaintiff waived any discrimination claim.

Because the Court has decided to grant First Interstate's motion to Dismiss and Fannie Mae' s Motion for Summary Judgment, the Court has no occasion to address the merits of Plaintiff's Motion for Summary Judgment. Moreover, "A motion for partial summary judgment seeking dismissal of an affirmative defense is improper" under federal law. Uniroyal, Inc. v. Heller, 65 F.R.D. 83, 86 (S.D. N.Y. 1974). Plaintiff's motion therefore will be denied.

The Court need not reach any of the other pending motions.

ACCORDINGLY,

IT IS HEREBY ORDERED that Plaintiff's Motion for Leave to Amend Complaint [docket #74] is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff's Supplement to Plaintiff's Motion for Leave to Amend Complaint [docket #82] is **DENIED**.

IT IS FURTHER ORDERED that Defendant First Interstate's Motion to Dismiss [docket #73], which the Court construes as a Motion for Summary Judgment, is **GRANTED**.

IT IS FURTHER ORDERED sua sponte that Defendant Fannie Mae shall have **SUMMARY**

JUDGMENT on Plaintiff's claims on the grounds that they are untimely.

IT IS FURTHER ORDERED that if Plaintiff wishes to present any additional evidence on the statute of limitations issue, he may do so by filing a motion to reconsider within twenty (20) days of the date of this Memorandum and Order.

IT IS FURTHER ORDERED that if Plaintiff elects to file any additional evidence on the statute of limitations issue, Defendants First Interstate and Fannie Mae shall have five days to reply to it.

In the alternative, **IT IS FURTHER ORDERED** that Defendant Fannie Mae's Motion for Summary Judgment [docket #72] is **GRANTED**.

In the alternative, **IT IS FURTHER ORDERED** sua sponte that Defendant First Interstate shall have **SUMMARY JUDGMENT** on Plaintiff's claims on the grounds that Plaintiff was not qualified for a Fannie Mae-backed loan through First Interstate.

IT IS FURTHER ORDERED that all other pending motions are **DENIED** as moot.

An appropriate Judgment will accompany this Memorandum and order.

Dated this 29th day of April, 1996.

/s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BRUCE RING,	)	
Plaintiff,	)	
	)	
V.	)	Cause No. 4:93CV25G2 JCH
	)	
FEDERAL NATIONAL	)	
MORTGAGE	)	
ASSOCIATION, and	)	
FIRST INTERSTATE	)	
COMMERCIAL	)	
MORTGAGE COMPANY,	)	
Defendants.	)	

JUDGMENT

Pursuant to the Memorandum and Order issued this day and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant First Interstate's Motion to Dismiss, which the Court construes as a Motion for Summary Judgment, is **GRANTED.**

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED sua sponte that Defendant Fannie Mae shall have **SUMMARY JUDGMENT** on Plaintiff's claims on the

grounds that they are untimely.

In the alternative, **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that Defendant Fannie Mae's Motion for Summary Judgment is **GRANTED.**

In the alternative, **IT IS FURTHER ORDERED** sua sponte that Defendant First Interstate shall have **SUMMARY JUDGMENT** on 'Plaintiff's claims on the grounds that Plaintiff was not qualified for a Fannie Mae-backed loan through First Interstate.

Dated this 29 day of April, 1996.

/s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

APPENDIX C

CORRESPONDENCE

August 7, 1989

Mr. Joseph Marsh
Federal National Mortgage Association
P.O. Box 650043
Dallas, Texas 75265-0043
RE: Prospective Prior Approval Loans
St. Louis, Missouri

Dear Joe:

Enclosed is a preliminary package on the seven separate apartment buildings in St. Louis which I discussed with you last week. Ideally, the borrower, an individual, would like one loan on the seven properties, or seven loans on the seven properties. However, he is willing to allow you to "cherry pick" and package and/or delete as you wish. He is presently on a short-term bank, loan at 10.5-11% on each property. He is seeking any improvement possible in his overall debt structure.

Six of the properties are within the limits of the City of St. Louis. The remaining property (#7--6250 Clemens Avenue) is in the City of University City, which is in St. Louis County. The City of St. Louis is not in any county and it has its own Recorder of Deeds office.

The two properties on Delmar Boulevard are the only properties, that are nearly contiguous (they are less than two

blocks apart). They are also the two best located properties, as they are and the,directly across from St. Louis Regional Medical Center, "area immediately to the south, known as De Balivere Place, is a highly successful "urban gentry" enclave.

The property in University City is also in a very nice and convenient neighborhood, however, as previously mentioned, it stands alone politically.

Perhaps the most readily leaseable property is the one on Lindell Boulevard (#6). The units are all efficiencies, but the location across the street from St. Louis University, and three blocks from both a large V.A. hospital and the headquarters and training Center of A.G. Edwards & Company, a member of the NYSE.

The property on Kingshighway (#2) is probably the best physical specimen. Its specific location is also quite nice (see enclosed small photos), but there are definitely some "rough areas" within a few blocks.

The property on Page Avenue is a "Pioneering" location, as is the property on Hamilton Avenue. The Page Avenue property has been fully rehabbed, but the Hamilton property is presently in only the very early stages. While I applaud the borrower's effort to provide decent housing in these two locations, frankly, I would not personally want to invest in either location.

I would appreciate your returning the photographs after reviewing the package. Should you wish to proceed with an application on any or all of these properties,

obviously, I will send you several more sets in our full submission.

I will call you later this week to learn of your impression of the properties. Thank you for considering this unusual loan request.

Very truly yours,

/s/ Ken Green
Kenneth B. Green
Assistant Vice President

KBG:mim
Enclosure

August 30, 1989

Mr. Kenneth B. Green
Assistant Vice President
First Interstate Mortgage
800 Maryland Avenue, Suite 1440
St. Louis, MO 63105

Dear Mr. Green:

RE: Prospective Prior Approval Loans
St. Louis, Missouri

As we discussed, we are unable to accept your request for a loan application for the referenced projects. We appreciate your interest in our multifamily program and hope we can do business together in the future.

We are returning your preliminary package as requested.

Sincerely,

/s/ Joe Marsh
Joe W. Marsh
Underwriter

JWM/ds

December 4, 1989

The Honorable John C. Danforth
U.S. Senate
St. Louis District Office
Old Post Office
815 Olive Street, Room 228
St. Louis, Missouri 63101

Dear Senator Danforth:

This letter is in response to your letter to Gary Lutz dated November 7, 1989.

Fannie Mae is deeply concerned about the suggestion that the corporation has refused to provide mortgage loans to multifamily projects in St. Louis' "black community." Your letter mentioned one specific request by City Wide Realty, and referred to information you received that Fannie Mae also denied funding of several viable projects in other St. Louis communities.

Under its charter, Fannie Mae's mission is to expand the supply of affordable housing for low-, moderate and middle-income families. We do that every day through our basic businesses, in which we buy single-family and multifamily loans from lenders and replenish the supply of mortgage funds for their borrowers. in. this way, we support a wider range of mortgage lending than would otherwise be

possible, including lending specifically targeted to the needs of lower income households and neighborhoods.

Our underwriting standards are intended to protect against basic default risk while bringing affordable housing within reach for the widest possible range of households. We do not accept, condone, or permit redlining in any fashion. Our lender guidelines are quite explicit on this issue. We also continuously review our underwriting standards and make changes when needed.

Upon receipt of your letter, I asked our staff to review the City Wide Realty case. They report that a loan application package was never formally submitted. In August, Fannie Mae received a preliminary inquiry from the lender, First Interstate Mortgage, on a package of seven multifamily properties. A Fannie Mae investment officer from our Southwestern Regional Office made an informal, exterior inspection of five of the seven properties mentioned in the preliminary inquiry. He reported that the five properties were not in satisfactory physical condition and some of the units appeared to be uninhabitable. Accordingly, the Regional Office informed the lender that Fannie Mae could not finance these properties in their current physical condition. The lender relayed this information to Mr. Bruce Ring, president of City Wide Realty, and offered to submit a formal application to Fannie Mae on one or more specific properties if Mr. Ring would supply him with the appropriate financial information. To date, the lender has not received

such information.

With regard to other projects, we are not aware of any in St. Louis' Northside or West End communities that have been rejected by Fannie Mae, as suggested in your letter. I would appreciate the opportunity to review any more specific information you might have. I want to make sure you are satisfied with the effectiveness of our community lending and neighborhood revitalization efforts.

Through our Office of Low- and Moderate-Income Housing, Fannie Mae encourages lenders to serve low- and moderate-income households. Since the Office was created less than three years ago, we have committed to more than $3 billion in specialized financings designed to make decent housing more affordable for some 60,000 households of modest means. In St. Louis this spring, for example, we issued a $5 million commitment to Boatmen's Mortgage Company to purchase single-family loans under a specially designed affordable mortgage program to benefit low- and moderate-income home buyers. This commitment will be targeted for neighborhood revitalization within the city of St. Louis. A similar program is being considered by Mercantile Bank of St. Louis and we are hopeful a commitment will be issued by year end.

In addition, in the city of St. Louis, Fannie Mae has financed seven multifamily, FHA insured projects that are serving low- and moderate-income renters. These projects provide rental housing for a total of 1,097 households with

Fannie Mae financing of $19.5 million.

A more detailed description of these special efforts is included in the enclosed Fannie Mae's Low- and Moderate-Income Housing Initiatives.

With respect to the City Wide Realty properties, we continue to stand ready to review a complete application proposal on a specific property that meets appropriate physical standards and financial criteria.

Please let me know if I can help in any other way to address the concerns raised in your letter.

Sincerely,

/s/ Bill Maloni

WRM/rib

Enclosure

January 23, 1990

The Honorable John Danforth
United States Senate
St. Louis District Office -- Old Post Office
815 Olive Street -- Room 228
St. Louis, Missouri 63101

Dear Senator Danforth:

Thanks very much for the chance to discuss the concerns raised by your constituent, Mr. Bruce Ring, in his letter to you of December 27, 1989.

In previous correspondence concerning Mr. Ring, I explained that Fannie Mae had made a preliminary evaluation of properties based on a package submitted on Mr. Ring's behalf by the lender First Interstate Mortage. The Regional Office determined that it could not finance five of the seven properties because their physcial condition was not satisfactory and several appeared uninhabitable. I also stated that the lende: had relayed this decison to Mr. Ring, and offered to submit a formal applicatoin to Fannie Mae, based on appropriate financial information. However, First Interstate told our staff that it had not reveived that information from Mr. Ring by the time we responded to you initial inquiry (December 4, 1989).